

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAFeway INC.; WALGREEN CO.; THE  
KROGER CO.; NEW ALBERTSON'S, INC.;  
AMERICAN SALES COMPANY, INC.; and HEB  
GROCERY COMPANY, LP,

Plaintiffs,

v.

ABBOTT LABORATORIES,

Defendant.

No. C 07-05470 CW

ORDER DENYING  
DEFENDANT ABBOTT  
LABORATORIES'  
OMNIBUS MOTION TO  
DISMISS

MEIJER, INC. & MEIJER DISTRIBUTION,  
INC.; ROCHESTER DRUG CO-OPERATIVE,  
INC.; and LOUISIANA WHOLESALE DRUG  
COMPANY, INC., on behalf of  
themselves and all others similarly  
situated,

Plaintiffs,

v.

ABBOTT LABORATORIES,

Defendant.

No. C 07-5985 CW

RITE AID CORPORATION; RITE AID HDQTRS  
CORP.; JCG (PJC) USA, LLC; MAXI DRUG,  
INC D/B/A BROOKS PHARMACY; ECKERD  
CORPORATION; CVS PHARMACY, INC.; and  
CAREMARK LLC,

Plaintiffs,

v.

ABBOTT LABORATORIES,

Defendant.

No. C 07-6120 CW

1 SMITHKLINE BEECHAM CORPORATION, d/b/a No. C 07-5702 CW  
2 GLAXOSMITHKLINE,

3 Plaintiff,

4 v.

5 ABBOTT LABORATORIES,

6 Defendant.  
7 \_\_\_\_\_/

8 Defendant Abbott Laboratories moves to dismiss the second  
9 amended complaints of Plaintiffs Safeway, Inc., et al.; Meijer,  
10 Inc., et al.; and Rite Aid Corporation, et al. (collectively,  
11 Direct Purchasers) and Counts 1, 3 and 4 of Plaintiff SmithKline  
12 Beecham Corporation's (GSK) complaint. Abbott argues, among other  
13 things, that the Ninth Circuit's decision in John Doe 1 v. Abbott  
14 Laboratories, 571 F.3d 930 (9th Cir. 2009), forecloses the Direct  
15 Purchasers' and most of GSK's claims. Direct Purchasers and GSK  
16 oppose Abbott's motion. The motion was heard on October 15, 2009.  
17 Having considered oral argument and all of the papers submitted by  
18 the parties, the Court DENIES Abbott's Omnibus Motion to Dismiss.

19 BACKGROUND

20 Protease inhibitors (PIs) are considered the most potent class  
21 of drugs to combat the HIV virus. In 1996, Abbott introduced  
22 Norvir as a stand-alone PI with a daily recommended dose of 1,200  
23 milligrams (twelve 100-mg capsules a day), priced at approximately  
24 eighteen dollars per day. Norvir is the brand name for a patented  
25 compound called ritonavir.

26 After Norvir's release, it was discovered that, when used in  
27 small quantities with another PI, Norvir would "boost" the anti-  
28 viral properties of that PI. Not only did a small dose of Norvir

1 -- about 100 to 400 milligrams per day -- make other PIs more  
2 effective and decrease the side effects associated with high doses,  
3 but it also slowed the rate at which HIV developed resistance to  
4 the effects of those PIs. The use of Norvir as a "booster" has  
5 enabled HIV patients to live longer. But the use of Norvir as a  
6 booster, and not a stand-alone PI, has also meant that the average  
7 daily price of Norvir has plummeted since Norvir was first  
8 introduced, because patients need a much smaller daily dose of  
9 Norvir when it is used as a booster compared to when it is used as  
10 a stand-alone PI. By 2003, the average price for a daily dose of  
11 Norvir was \$1.71.

12 In 2000, Abbott introduced Kaletra, a single pill containing  
13 the PI lopinavir as well as ritonavir, which is used to boost the  
14 effects of lopinavir. Although effective and widely used, Kaletra  
15 causes some patients to experience significant side effects.

16 In 2003, two new PIs, Bristol-Myers Squibb's Reyataz and GSK's  
17 Lexiva, were about to be introduced to the market. Studies showed  
18 that, when boosted with Norvir, the new PIs were as effective as  
19 Kaletra, and were more convenient. In July, 2003, Reyataz was  
20 successfully introduced to the market. As a result, Kaletra's  
21 market share fell more than Abbott had anticipated. The average  
22 daily dose of Norvir also fell. Before Reyataz's release, the most  
23 common boosting dose of Norvir ranged from 200 milligrams to 400  
24 milligrams a day. Clinical trials, however, showed that a Norvir  
25 dose of only 100 milligrams a day effectively boosted Reyataz.

26 On December 3, 2003, Abbott raised the wholesale price of  
27 Norvir by 400 percent while keeping the price of Kaletra constant.  
28 Abbott contends that it did this so that the price of Norvir would

1 be more in line with the drug's enormous clinical value.  
2 Plaintiffs contend that the Norvir price increase was an illegal  
3 attempt to achieve an anticompetitive purpose in the "boosted  
4 market," which Plaintiffs define as the market for those PIs, such  
5 as Reyataz, Lexiva and Kaletra, that are prescribed for use with  
6 Norvir as a booster.

7 Direct Purchasers allege that Abbott engaged in predatory  
8 pricing of a bundled product in the boosted market (Kaletra) and  
9 violated its duty to deal in the boosting market (Norvir), both in  
10 violation of Section 2 of the Sherman Act. In addition to  
11 antitrust and other claims brought under state law, GSK alleges  
12 that Abbott violated Section 2 of the Sherman Act by breaching its  
13 antitrust duty to deal. Plaintiffs in the Meijer action intend to  
14 move to certify this case as a class action and to prosecute their  
15 claims on behalf of a class of

16 [a]ll persons or entities in the United States that  
17 purchased Norvir and/or Kaletra directly from Abbott or  
18 any of its divisions, subsidiaries, predecessors, or  
19 affiliates during the period from December 3, 2003  
20 through such time as the effects of Abbott's illegal  
21 conduct have ceased, and excluding federal governmental  
22 entities, Abbott, and Abbott's divisions, subsidiaries,  
23 predecessors, and affiliates.

24 Meijer, et al., 2d Am. Compl. (SAC) ¶ 57.

#### 25 LEGAL STANDARD

26 A complaint must contain a "short and plain statement of the  
27 claim showing that the pleader is entitled to relief." Fed. R.  
28 Civ. P. 8(a). When considering a motion to dismiss under Rule  
12(b)(6) for failure to state a claim, dismissal is appropriate  
only when the complaint does not give the defendant fair notice of  
a legally cognizable claim and the grounds on which it rests.

1 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In  
2 considering whether the complaint is sufficient to state a claim,  
3 the court will take all material allegations as true and construe  
4 them in the light most favorable to the plaintiff. NL Indus., Inc.  
5 v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this  
6 principle is inapplicable to legal conclusions; "threadbare  
7 recitals of the elements of a cause of action, supported by mere  
8 conclusory statements," are not taken as true. Ashcroft v. Iqbal,  
9 \_\_\_\_ U.S. \_\_\_\_, 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550  
10 U.S. at 555).

#### 11 DISCUSSION

12 "Section 2 of the Sherman Act makes it unlawful to monopolize,  
13 or attempt to monopolize, or combine or conspire with any other  
14 person or persons, to monopolize any part of the trade or commerce  
15 among the several States, or with foreign nations." Pac. Bell Tel.  
16 Co. v. Linkline Commc'ns, Inc., \_\_\_\_ U.S. \_\_\_\_, 129 S. Ct. 1109, 1118  
17 (2009).

18 The parties dispute the elements of predatory pricing and  
19 duty-to-deal claims under Section 2. Abbott argues that Doe  
20 controls the outcome of this case and that, as a result, Direct  
21 Purchasers must allege "below-cost pricing of Kaletra and a  
22 dangerous probability of recoupment in the 'boosted' market"  
23 successfully to plead predatory pricing. Abbott's Mot. at 10.  
24 With regard to their duty-to-deal claims, Abbott argues that Direct  
25 Purchasers and GSK must allege "a duty to deal and a refusal to  
26 deal in the Norvir 'booster' market." Abbott's Mot. at 10.

27 Plaintiffs assert that Doe did not change the law applicable  
28 to this case because Doe did not involve a predatory pricing claim

1 or a duty-to-deal claim. Direct Purchasers argue that if the Court  
2 were to adopt Abbott's definition of predatory pricing, the Court  
3 would have to find that Doe silently overruled Cascade Health  
4 Solutions v. Peacehealth, 515 F.3d 883 (9th Cir. 2008). In  
5 Cascade, the Ninth Circuit stated that a plaintiff need not prove  
6 dangerous probability of recoupment in predatory pricing cases  
7 involving bundled products. Id. at 910 n.21. With regard to their  
8 duty-to-deal claims, Direct Purchasers and GSK assert that Doe did  
9 not alter the requirements set forth in Aspen Skiing Company v.  
10 Aspen Highlands Skiing Corporation, 472 U.S. 585 (1985), which they  
11 maintain applies to their claims.

12 Although Doe involved the same conduct alleged here, the Doe  
13 plaintiffs proceeded on a different antitrust theory. They  
14 asserted that Abbott engaged in monopoly leveraging, which the  
15 Ninth Circuit held to state an antitrust claim in Image Technical  
16 Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1202 (9th Cir.  
17 2007). However, unlike the plaintiffs in Image Technical, the Doe  
18 plaintiffs did not allege a refusal to deal. See 125 F.3d 1195,  
19 1209-11; see also Doe, 571 F.3d at 935 ("Image Technical involved a  
20 refusal to deal."). Nor did the Doe plaintiffs allege below-cost  
21 pricing.

22 In Doe, this Court certified for interlocutory appeal the  
23 question, among others, of whether the plaintiffs' monopoly  
24 leveraging theory constituted a cognizable antitrust injury.

25 Based on the Supreme Court's decision in Linkline, the Ninth  
26 Circuit held that the plaintiffs' theory did not state a Section 2  
27 claim. Doe, 571 F.3d at 935. As plead, the plaintiffs' theory was  
28 the functional equivalent of the "price squeeze" theory that the

1 Supreme Court rejected in Linkline. Id.; see also Linkline, 129 S.  
2 Ct. at 1114. The court stated that the plaintiffs' claim failed  
3 because they alleged "no refusal to deal at the booster level, and  
4 no below cost pricing at the boosted level."<sup>1</sup> Id.

5 In numerous instances throughout the opinion, the Doe court  
6 made clear that its holding was limited to the plaintiffs' theory  
7 of monopoly leveraging. The first paragraph states that at issue  
8 was whether

9 allegations of monopoly leveraging through pricing  
10 conduct in two markets state a claim under § 2 of the  
11 Sherman Act, 15 U.S.C. § 2, absent an antitrust refusal  
12 to deal (or some other exclusionary practice) in the  
monopoly market or below-cost pricing in the second  
market[.]

13 Doe, 571 F.3d at 931 (emphasis added). Further, the Doe court  
14 acknowledged that this Court had certified other issues for appeal,  
15 including "whether the below-cost pricing test for bundled  
16 discounts . . . adopted in Cascade Health Solutions v. Peacehealth  
17 applies to this monopoly leveraging case." Id. at 932 (citation  
18 omitted). However, because it decided that the plaintiffs' theory  
19 failed to state a Section 2 claim, the court did not reach  
20 "Cascade's impact on this case or others pending in the district  
21 court." Id. at 935. In particular, the court did not consider  
22 whether a dangerous probability of recoupment was required to state  
23 a "price-based claim" under Section 2 because the plaintiffs did  
24 not allege below-cost pricing. Id. (stating that "given Does'  
25 failure to allege the first prong of the test for a § 2 price-based

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26  
27 <sup>1</sup> Indeed, Doe suggests that had the plaintiffs been able to  
28 amend their complaint to include allegations of a refusal to deal  
and below-cost pricing, the outcome may have been different. See  
Doe, 571 F.3d at 935 n.4.

1 claim (below-cost pricing), we have no need to reach the second  
2 (dangerous probability) prong"). Indeed, the Doe court suggested  
3 that "a free-standing monopoly leveraging claim" may be viable,  
4 notwithstanding Linkline, if accompanied by an allegation of a  
5 refusal to deal.<sup>2</sup>

6 Given Doe's narrow focus on the viability of a monopoly  
7 leveraging claim absent allegations of a refusal to deal, Doe does  
8 not foreclose Direct Purchasers' and GSK's antitrust theories.  
9 Direct Purchasers assert antitrust violations based on Abbott's  
10 alleged predatory pricing of a bundled product, and both Direct  
11 Purchasers and GSK allege a breach of the duty to deal. Contrary  
12 to Abbott's argument, the court had no occasion to consider the  
13 elements of these theories because the Doe plaintiffs did not plead  
14 them. The Court therefore rejects Abbott's effort to expand Doe to  
15 encompass antitrust theories that the Ninth Circuit did not  
16 address. Doe does not control the outcome of this case.

17 I. Direct Purchasers' Predatory Pricing Claims

18 As noted above, Direct Purchasers allege that Abbott engaged  
19 in predatory pricing with regard to Kaletra and the boosted market.  
20 They maintain that Kaletra, which contains lopinavir as well as

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21 <sup>2</sup> The court stated:

22 Does nevertheless submit that they should be allowed to  
23 proceed because we previously embraced the principle of a  
24 free-standing monopoly leveraging claim in Image  
25 Technical Services, Inc. v. Eastman Kodak Co. However,  
26 Image Technical involved a refusal to deal. Read in that  
context and in light of Linkline, Image Technical does  
not save Does' claim.

27 571 F.3d at 935 (citation omitted). Thus, although the court  
28 rejected the plaintiffs' monopoly leveraging theory, it did not  
overrule Image Technical. It distinguished Image Technical because  
that case involved allegations of a refusal to deal.



1 ritonavir, constitutes a bundled product. Thus, they argue, their  
2 pleadings should be scrutinized under the "discount attribution"  
3 standard in Cascade. In its previous omnibus motion to dismiss,  
4 Abbott agreed that Cascade controls in such cases. January 31,  
5 2008 Notice of Mot. and Omnibus Mot. of Abbott to Dismiss Pls.'  
6 Sherman Act Claims Pursuant to Rule 12(b)(6) at 7.

7 In Cascade, the Ninth Circuit held that the test developed by  
8 the Supreme Court in Brooke Group Ltd. v. Brown & Williamson  
9 Tobacco Corporation, 509 U.S. 209 (1993), for predatory pricing in  
10 the sale of a single product does not directly apply in cases that  
11 involve bundled-product discounting. As an alternative, Cascade  
12 set forth the "discount attribution" standard, which courts use to  
13 determine whether bundled-product pricing is anticompetitive.  
14 Under the standard,

15 the full amount of the discounts given by the defendant  
16 on the bundle are allocated to the competitive product or  
17 products. If the resulting price of the competitive  
18 product or products is below the defendant's incremental  
19 cost to produce them, the trier of fact may find that the  
20 bundled discount is exclusionary for the purpose of § 2.  
21 This standard makes the defendant's bundled discounts  
22 legal unless the discounts have the potential to exclude  
23 a hypothetical equally efficient producer of the  
24 competitive product.

25 Cascade, 515 F.3d at 906. As noted above, Cascade does not require  
26 that a plaintiff plead dangerous possibility of recoupment, which  
27 is required in single-product pricing cases. Id. at 910 n.21.

28 Abbott maintains that, in Linkline, the Supreme Court  
"rejected the use of the sort of attribution or imputed price test  
set forth in Cascade." Reply at 4. In Linkline, the Supreme Court  
opined that a test that presumes that an unlawful price squeeze  
exists when an "upstream monopolist could not have made a profit by

1 selling at its retail rates if it purchased inputs at its own  
2 wholesale rates" lacked "any ground in our antitrust  
3 jurisprudence." 129 S. Ct. 1121-22. This is because, the Supreme  
4 Court explained, an "upstream monopolist with no duty to deal is  
5 free to charge whatever wholesale price it would like . . . ." Id.  
6 at 1122. This dicta does not reject Cascade's discount attribution  
7 test. The Cascade court developed the test to address predatory  
8 pricing, not price squeezes. Indeed, Doe distinguishes below-cost  
9 pricing from price squeezing. See Doe, 571 F.3d at 935. Unlike  
10 the present case, Linkline did not involve alleged predatory  
11 pricing of a bundled product where a defendant had an antitrust  
12 duty to deal.<sup>3</sup> This Court will not disregard controlling Ninth  
13 Circuit precedent based on inapplicable Supreme Court dicta.

14 Applying Cascade's discount attribution test, the Court  
15 concludes that Direct Purchasers sufficiently state a Section 2  
16 violation. Direct Purchasers aver that, when consumers purchase  
17 Kaletra, Abbott offers a substantial discount on ritonavir as a  
18 result of its bundling with lopinavir. Direct Purchasers maintain  
19 that, when the full amount of this discount is attributed to  
20 lopinavir, a competitive product in the boosted market, the  
21 resulting price is below Abbott's average variable cost to produce  
22 lopinavir. These allegations support Direct Purchasers' claim that  
23 Abbott engaged in unlawful predatory pricing through bundled

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24  
25 <sup>3</sup> Abbott maintains that DSL service, which was at issue in  
26 Linkline, was presented as a bundled product. Although the Court  
27 disagrees with Abbott's characterization, it need not decide this  
28 point. Even if a bundled product was involved, Linkline is  
nonetheless distinguishable because the defendant did not have a  
duty to deal. 129 S. Ct. at 1119. Here, Plaintiffs have alleged  
such a duty.

1 discounting.

2 II. Direct Purchasers' and GSK's Claims Based on an Antitrust Duty  
3 to Deal

4 Albeit in different terms, each Plaintiff avers that Abbott  
5 engaged in exclusionary conduct by increasing Norvir's price  
6 because the change disrupted a longstanding course of dealing.  
7 Plaintiffs maintain that this change was intended to impede  
8 competition, and, accordingly, constitutes a violation of Abbott's  
9 antitrust duty to deal. Abbott argues that, because they do not  
10 allege that it explicitly refused to deal with them, Plaintiffs do  
11 not plead cognizable exclusionary conduct.

12 In Aspen Skiing, the Supreme Court upheld a jury verdict of  
13 Section 2 liability when a "monopolist elected to make an important  
14 change in a pattern of distribution that had originated in a  
15 competitive market and had persisted for several years." 472 U.S.  
16 at 603. There, the defendant owned three of the four ski resorts  
17 in Aspen, Colorado. Id. at 587-89. For several years, the  
18 defendant, along with the plaintiff who owned the fourth ski  
19 resort, had offered a ski lift pass that could be used at any Aspen  
20 ski resort. Id. at 589-90. Proceeds from the sale of the all-  
21 Aspen pass were divided between the defendant and the plaintiff,  
22 based on a survey of which resorts consumers actually frequented.  
23 Id. at 590-91. The plaintiff's share of revenue fluctuated year-  
24 to-year, depending on its attendance attributable to the ski pass.

25 Believing, among other things, that the survey upon which  
26 revenues were allocated was inaccurate and that the ski pass "was  
27 siphoning off revenues that could be recaptured," the defendant  
28 sought to discontinue the joint program. Id. at 592. It extended

1 the plaintiff "an offer that it could not accept;" the defendant  
2 would only agree to continue the program if the plaintiff agreed to  
3 a fixed percentage of revenue, far below what the plaintiff had  
4 received in the past. Id. After the plaintiff rejected this  
5 offer, the defendant took actions "that made it extremely  
6 difficult" for the plaintiff to compete. Id. at 593. Eventually,  
7 the plaintiff's market share plummeted. Id. at 594-95.

8 On appeal, the defendant asserted that it had no duty to deal  
9 with the plaintiff. The Supreme Court agreed that, generally, a  
10 business has a right to select customers and associates, but stated  
11 that this right is not unqualified. Id. at 601. Quoting Lorain  
12 Journal Co. v. United States, 342 U.S. 143, 155 (1951), the Supreme  
13 Court stated,

14 The right . . . is neither absolute nor exempt from  
15 regulation. Its exercise as a purposeful means of  
16 monopolizing interstate commerce is prohibited by the  
17 Sherman Act. . . . 'In the absence of any purpose to  
18 create or maintain a monopoly, the act does not restrict  
the long recognized right of trader or manufacturer  
engaged in an entirely private business, freely to  
exercise his own independent discretion as to parties  
with whom he will deal.'

19 Aspen Skiing, 472 U.S. at 602 (emphasis supplied by Aspen Skiing  
20 court). Because it found sufficient evidence to show that  
21 anticompetitive intent motivated the defendant's unreasonable  
22 offer, the Court upheld the jury's verdict in favor of the  
23 plaintiff. As the Court explained later, the Aspen Skiing Court

24 found significance in the defendant's decision to cease  
25 participation in a cooperative venture. The unilateral  
26 termination of a voluntary (and thus presumably  
27 profitable) course of dealing suggested a willingness to  
28 forsake short-term profits to achieve an anticompetitive  
end. Similarly, the defendant's unwillingness to renew  
the ticket even if compensated at retail price revealed a  
distinctly anticompetitive bent.

1 Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540  
2 U.S. 398, 409 (2004) (emphasis in original).

3 In Verizon, the Court found that the defendant's conduct did  
4 not fall under the Aspen Skiing exception to the rule that  
5 businesses do not have a duty to aid competitors. In that case,  
6 the Telecommunications Act of 1996 imposed an obligation on Verizon  
7 to share its telephone network with competitors. Id. at 401-02.  
8 As part of that duty, Verizon had to process competitors' orders  
9 for access to its network. Id. at 404-05. The plaintiff accused  
10 Verizon of processing Verizon's rivals' access requests in an  
11 untimely fashion, if at all, which the plaintiff alleged was "part  
12 of an anticompetitive scheme to discourage customers from becoming  
13 or remaining customers of [Verizon's competitors]." Id. at 404-05.  
14 This conduct did not violate Section 2 of the Sherman Act.  
15 Distinguishing the case from Aspen Skiing, the Court stated,

16 The complaint does not allege that Verizon voluntarily  
17 engaged in a course of dealing with its rivals, or would  
18 ever have done so absent statutory compulsion. Here,  
19 therefore, the defendant's prior conduct sheds no light  
upon the motivation of its refusal to deal--upon whether  
its regulatory lapses were prompted not by competitive  
zeal but by anticompetitive malice.

20 Id. at 409.

21 Taken together, Aspen Skiing and Verizon demonstrate that  
22 liability under Section 2 can arise when a defendant voluntarily  
23 alters a course of dealing and "anticompetitive malice" motivates  
24 the defendant's conduct. See MetroNet Svcs. Corp. v. Owest Corp.,  
25 383 F.3d 1124, 1131-32 (9th Cir. 2004). When a firm declines to  
26 cooperate with a competitor, that decision may have "evidentiary  
27 significance" as to the defendant's anticompetitive intent and may  
28 give rise to liability under Section 2. See Aspen Skiing, 475 U.S.

1 at 601 ("The absence of an unqualified duty to cooperate does not  
2 mean that every time a firm declines to participate in a particular  
3 cooperative venture, that decision may not have evidentiary  
4 significance, or that it may not give rise to liability in certain  
5 circumstances.")

6 Plaintiffs' allegations sufficiently support a duty-to-deal  
7 claim under Section 2. Plaintiffs maintain that, before raising  
8 Norvir's price in December, 2003, Abbott had voluntarily engaged in  
9 licensing agreements with its competitors and, unlike in Verizon,  
10 this cooperation was not compelled by statute. These agreements  
11 allowed Abbott's competitors to market their PIs along with Norvir.  
12 Plaintiffs maintain that these agreements, which were entered into  
13 with many of Abbott's rivals, induced Abbott's competitors to rely  
14 on Norvir's availability on the market, subject to normal,  
15 inflation-level price increases.

16 Once Abbott recognized that Kaletra would face new competitors  
17 in the boosted PI market, Abbott changed its voluntary course of  
18 dealing by imposing a 400 percent increase in the price of Norvir.  
19 Plaintiffs allege sufficient facts to show that this pricing  
20 conduct could have been motivated by anticompetitive malice.  
21 Direct Purchasers aver that Abbott hiked the price to impede its  
22 "competitors' ability to compete with Kaletra." Safeway, et al.  
23 SAC ¶ 42; Meijer, et al. SAC ¶ 38; Rite Aid, et al. SAC ¶ 40. They  
24 point to the fact that the price of Norvir increased without a  
25 commensurate rise in the price of Kaletra, which contains Norvir.  
26 Further, both Direct Purchasers and GSK quote documents and emails  
27 to corroborate their claims of anticompetitive motive. Thus,  
28 Plaintiffs' complaints not only plead a radical change in a

1 voluntary course of dealing, but also allege facts that suggest  
2 anticompetitive malice motivated Abbott's conduct.

3 Abbott argues that Plaintiffs' allegations do not amount to an  
4 actionable refusal to deal because it never refused outright to  
5 sell Norvir. However, precedent does not require an outright  
6 refusal. Although the Supreme Court and the Ninth Circuit refer to  
7 this conduct as a "refusal to deal," it encompasses circumstances,  
8 as in Aspen Skiing, when a monopolist sets exorbitant terms that a  
9 competitor would not accept. See Aspen Skiing, 472 U.S. at 592.  
10 "An offer to deal with a competitor only on unreasonable terms and  
11 conditions can amount to a practical refusal to deal." MetroNet,  
12 383 F.3d at 1132. Here, the 400 percent price increase on Norvir  
13 placed GSK and Abbott's other competitors in the untenable position  
14 of selling their boosted PIs at a price that could not compete with  
15 Kaletra. By setting such unattractive terms, Abbott essentially  
16 refused to deal with its competitors.

17 Abbott also maintains that a duty to deal violation requires  
18 Plaintiffs to show it had a "willingness to forsake short-term  
19 profits." Mot. to Dismiss at 20-21 (citing Trinko, 540 U.S. at  
20 409; MetroNet, 383 F.3d at 1132). However, in Trinko and MetroNet,  
21 the Supreme Court and the Ninth Circuit inquired into the effect on  
22 the defendants' short-term profitability to determine whether the  
23 defendants were motivated by anticompetitive intent. As the Trinko  
24 Court explained, a defendant's decision to forgo benefits in the  
25 short run provides evidence of a defendant's interest in reducing  
26 competition. See 540 U.S. at 409 ("The unilateral termination of a  
27 voluntary (and thus presumably profitable) course of dealing  
28 suggested a willingness to forsake short-term profits to achieve an

1 anticompetitive end. . . . Here, . . . the defendant's prior  
2 conduct sheds no light upon the motivation of its refusal to deal--  
3 upon whether its regulatory lapses were prompted not by competitive  
4 zeal but by anticompetitive malice."); see also MetroNet, 383 F.3d  
5 at 1132 (stating that, because the defendant did not forsake short-  
6 term profits, its termination of a prior course of dealing neither  
7 proved nor disproved whether it was motivated by anticompetitive  
8 malice). Proof of a short-term sacrifice is not an element of a  
9 Section 2 claim, but rather a means to show anticompetitive  
10 motives. Because a defendant is unlikely to admit that it engaged  
11 in exclusionary conduct, a court must look for indicia of a  
12 defendant's desire to injure competition, as the Ninth Circuit  
13 demonstrated in MetroNet. See 383 F.3d at 1132-33 (analyzing facts  
14 to determine whether they were significant in showing  
15 anticompetitive intent). Here, as noted above, Plaintiffs  
16 adequately plead facts to suggest that Abbott's price increase  
17 arose from improper motives.

18 While Abbott is correct that antitrust law imposes no  
19 generalized duty to deal, its deviation from its prior course of  
20 conduct with its competitors can constitute evidence of  
21 anticompetitive conduct in violation of Section 2. MetroNet, 383  
22 F.3d at 1131 (stating that under "'certain circumstances, a refusal  
23 to cooperate with rivals can constitute anticompetitive conduct and  
24 violate § 2'" (quoting Trinko, 540 U.S. at 408)). Plaintiffs'  
25 allegations suggest that Abbott's conduct qualifies, under Aspen  
26 Skiing, as an exception to the general rule.



1 III. Direct Purchasers' Claims of Monopolization of the Boosting  
2 Market

3 Direct Purchasers allege that Abbott monopolized the boosting  
4 market by keeping the price of Norvir at a reasonable level for  
5 several years, thereby inducing its competitors to rely on the  
6 availability of Norvir on these terms and to forgo development of  
7 their own PI boosters. Direct Purchasers maintain that this  
8 conduct enabled Abbott to suppress competition in the boosting  
9 market.

10 Abbott makes several arguments, none of which is persuasive.  
11 First, Abbott maintains that these allegations are not plausible  
12 and run counter to Linkline and Doe. However, the Court reads  
13 these allegations to assert an antitrust theory based on deceptive  
14 conduct that induced reliance, a theory that was not at issue in  
15 either Linkline or Doe. Thus, those cases do not apply to this  
16 claim. And the Court finds no reason to deem Direct Purchasers'  
17 allegations implausible.

18 Abbott also appears to argue that, because its purported  
19 patent rights enable it to license its product as it pleases,  
20 Direct Purchasers' claims fail. To the extent that Abbott has such  
21 rights, they do not defeat Direct Purchasers' claims; Direct  
22 Purchasers do not allege unlawful conduct arising from Abbott's  
23 licensing activity. Instead, as noted above, Direct Purchasers  
24 maintain that Abbott unlawfully deceived its competitors.

25 Finally, Abbott argues that Direct Purchasers have not  
26 satisfied the requirements of Broadcom Corporation v. Qualcomm,  
27 Inc., which involved "deceptive conduct before a private standards-  
28 determining organization." 501 F.3d 297, 303 (3d Cir. 2007).

1 Without deciding whether Broadcom comports with Ninth Circuit  
2 precedent, the Court does not find it applicable to this case:  
3 Direct Purchasers' allegations do not implicate deceptive conduct  
4 before a private standards-determining organization.

5 Accordingly, the Court finds that Direct Purchasers  
6 sufficiently state their claims for Abbott's monopolization of the  
7 boosting market.

8 IV. GSK's State Law Claims

9 Abbott maintains that GSK's claims under North Carolina law  
10 must fail because GSK has not plead cognizable claims under the  
11 Sherman Act. However, because the Court finds that GSK has  
12 adequately plead a violation of the Sherman Act, GSK adequately  
13 states claims under North Carolina's anti-monopolization and unfair  
14 and deceptive practices laws. See N.C. Gen. Stat. §§ 75-1.1 and  
15 75-2.1.

16 CONCLUSION

17 For the foregoing reasons, the Court DENIES Abbott's Omnibus  
18 Motion to Dismiss. The parties shall file dispositive motions by  
19 June 17, 2010. These motions shall be noticed for hearing on  
20 August 5, 2010.

21 IT IS SO ORDERED.

22 Dated: January 12, 2010



23 CLAUDIA WILKEN  
24 United States District Judge  
25  
26  
27  
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